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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/973,757	10/11/2001	Masatake Tamaru	VX012372	7173

21369 7590 10/25/2007
POSZ LAW GROUP, PLC
12040 SOUTH LAKES DR.
SUITE 101
RESTON, VA 20191

EXAMINER

CHOI, PETER H

ART UNIT	PAPER NUMBER
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3623

MAIL DATE	DELIVERY MODE
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10/25/2007

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Advisory Action Before the Filing of an Appeal Brief	Application No. 09/973,757	Applicant(s) TAMARU, MASATAKE	
	Examiner Peter Choi	Art Unit 3623	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 09 October 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 33-64.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

Beth Van Doren
 Primary Examiner
 AU 3623

Continuation of 11. does NOT place the application in condition for allowance because:

The previous objection to claim 45 is withdrawn in view of the amended claim dependency submitted in the amendment filed October 9, 2007.

With respect to Official Notice, Applicant has attempted to traverse the eight statements of Official Notice (1-7 previously raised, the 8th raised in the outstanding Office Action mailed May 7, 2007), and argues that the maintaining of Official Notice is improper. Applicant argues that statements (1)-(7) were timely challenged, and that there is no rule of law or Patent Office rule setting forth a specific time limit for challenging Official Notice after which a penalty applies to the Applicant. Statements (1)-(7) have been admitted as prior art, as a result of a traversal deemed by the Examiner to be inadequate.

As per statements (1)-(7), the Examiner asserts that the maintaining of Official Notice is indeed proper. As per the MPEP:

"2144.03 C If Applicant Challenges a Factual Assertion as Not Properly Officially Noticed or not Properly Based Upon Common Knowledge, the Examiner Must Support the Finding With Adequate Evidence

To adequately traverse such a finding, an applicant must specifically point out the supposed errors in the examiner's action, which would include stating why the noticed fact is not considered to be common knowledge or well-known in the art. See 37 CFR 1.111(b). See also Chevenard, 139 F.2d at 713, 60 USPQ at 241 ("[I]n the absence of any demand by appellant for the examiner to produce authority for his statement, we will not consider this contention."). A general allegation that the claims define a patentable invention without any reference to the examiner's assertion of official notice would be inadequate. If applicant adequately traverses the examiner's assertion of official notice, the examiner must provide documentary evidence in the next Office action if the rejection is to be maintained. See 37 CFR 1.104(c)(2). See also Zurko, 258 F.3d at 1386, 59 USPQ2d at 1697 ("[T]he Board [or examiner] must point to some concrete evidence in the record in support of these findings" to satisfy the substantial evidence test). If the examiner is relying on personal knowledge to support the finding of what is known in the art, the examiner must provide an affidavit or declaration setting forth specific factual statements and explanation to support the finding. See 37 CFR 1.104(d)(2).

If applicant does not traverse the examiner's assertion of official notice or applicant's traverse is not adequate, the examiner should clearly indicate in the next Office action that the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant either failed to traverse the examiner's assertion of official notice or that the traverse was inadequate. If the traverse was inadequate, the examiner should include an explanation as to why it was inadequate."

As per the MPEP, the Examiner is required, in the next Office action subsequent to the assertion of Official Notice, to clearly indicate that the statement is taken to be admitted as prior art due to a failure to adequately traverse said statement. As the Examiner is required to perform this step in the next Office action, the Applicant must traverse the statement of Official Notice in the response following the Office action in which it was initially raised. In this case, in response to the Official Notice taken in the Office action mailed December 20, 2005 (Official Notice statements (1) and (2))), the response filed on March 20, 2006 did not adequately traverse the statements of Official Notice. Similarly, the Official Notice statements taken in the Office Action mailed September 12, 2006 (Official Notice statements (3)-(7)) were not adequately traversed in the response filed on February 12, 2007. Thus, the Examiner asserts that the maintaining of Official Notice statements (1)-(7) are indeed proper.

Regarding statement (8), Applicant argued that the Examiner must cite a teaching reference in an area of art related to the invention of the present claims before such a teaching can be considered common knowledge for the presently claimed invention. Applicant argues that this teaching cannot be general human behavior, and that there must be some type of teaching or suggestion in the alleged common knowledge that would enable, and give a reason to, one of ordinary skill in the art to modify the teachings of Melby and/or Gudat to arrive at the presently claimed invention.

The Examiner respectfully disagrees. The Examiner asserts that analogous art may be applied in analyzing the obviousness of the claimed subject matter, as specified by the MPEP:

2141.01(a) Analogous and Nonanalogous Art

I. TO RELY ON A REFERENCE UNDER 35 U.S.C. 103, IT MUST BE ANALOGOUS PRIOR ART

The examiner must determine what is "analogous prior art" for the purpose of analyzing the obviousness of the subject matter at issue. "In order to rely on a reference as a basis for rejection of an applicant's invention, the reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." In re Oetiker, 977 F.2d 1443, 1446, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). See also In re Deminski, 796 F.2d 436, 230 USPQ 313 (Fed. Cir. 1986); In re Clay, 966 F.2d 656, 659, 23 USPQ2d 1058, 1060-61 (Fed. Cir. 1992) ("A reference is reasonably pertinent if, even though it may be in a different field from that of the inventor's endeavor, it is one which, because of the matter with which it deals, logically would have commended itself to an inventor's attention in considering his problem."); Wang Laboratories Inc. v. Toshiba Corp., 993 F.2d 858, 26 USPQ2d 1767 (Fed. Cir. 1993); and State Contracting & Eng'g Corp. v. Condotte America, Inc., 346 F.3d 1057, 1069, 68 USPQ2d 1481, 1490 (Fed. Cir. 2003) (where the general scope of a reference is outside the pertinent field of endeavor, the reference may be considered analogous art if subject matter disclosed therein is relevant to the particular problem with which the inventor is involved).

The Examiner asserts that, in view of the MPEP, a teaching of analogous art is adequate for use in an obviousness rejection. Although Official Notice statement (8) is not explicitly directed towards work machines, its teaching is still deemed to be reasonably pertinent to the claimed invention. The Examiner asserts that the principle of distributing information to a "leader", who in turn, propagates and distributes information to "subordinates" is old and well known in a plurality of endeavors in dictating how work is to be performed. The automation of information dissemination by a work machine does not change the basic fundamental concept that is being claimed.

For example, as noted by Applicant, in professional football games, a play is sent to the quarterback from the coach, who then communicates the play to the other players on the offense. In project management, a project leader is provided information regarding tasks and goals that are relayed to project team members. In machines, In a business or company, decisions and information are passed down according to a hierarchical structure. A regional supervisor would pass down said decisions and information to a store/branch supervisor, who in turn would pass down said decisions and information to their employees.

Furthermore, the Examiner asserts that in view of KSR, it would have been obvious to apply a known technique (providing information to a leader that further propagate information to subordinates, as cited in Official Notice statement (8)) recognized as part of the ordinary capabilities of one skilled in the art, to a known device (using work machines to perform work) would have yielded predictable results, specifically, using work machines to distribute information and perform work tasks in accomplishing goals/instructions set forth by the distributed information.